

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**THE INDIAN HEALTH SERVICE EQUAL
EMPLOYMENT OPPORTUNITY
COMPLAINTS PROCESS**

A Management Review



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Inspector General**

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EXECUTIVE SUMMARY

PURPOSE

To conduct a management review of the Equal Employment Opportunity (EEO) complaint process of the Indian Health Service (IHS).

BACKGROUND

The IHS Director requested that the Inspector General conduct an EEO management review including the following issues: timeliness, management practices, delegations of authority, conflict of interest, confidentiality, and training of EEO personnel at Headquarters and Area Offices.

The Assistant Secretary for Management and Budget (ASMB) has departmental responsibility to provide technical assistance and policy guidance to the operating divisions (OPDIVS). The OPDIV EEO offices are responsible for “establishing and maintaining EEO programs” and processing EEO complaints. The ASMB has primary responsibility for preparing final agency decisions on formal EEO complaints.

The IHS has delegated EEO responsibility for the Albuquerque, Nashville, Navajo, and Oklahoma City Area Offices and Headquarters West to the Oklahoma City Area Office.

We reviewed EEO policies and procedures, complainant files, and any other available documentation relating to the six issues we evaluated. We compared the EEO process at the Area Offices, Service Units and both Headquarters to the standards established in EEO laws and regulations and by ASMB’s “EEO Complaints Processing Checklist.” In Headquarters East and Oklahoma City, we reviewed 31 formal complaint files closed in the last 2 years. We reviewed all 26 of the available informal complaint files closed in the last 2 years at Area Offices and Service Units. Using structured discussion guides, we interviewed a total of 223 respondents at Headquarters, Area Offices and Service Units.

FINDINGS

The IHS Operates under Four Conditions Which Complicate the EEO Complaints Process: Indian Preference, Commissioned Corps, Tribal Contracting/Compacting, and Downsizing

Complaints involving the Commissioned Corps, Indian Preference or where tribal

contracting has occurred, create confusion in the IHS EEO complaints process. These issues, as well as downsizing, impact the scope and structure of the EEO process.

Inconsistencies in the EEO System Result in Unequal Treatment of Complaints

Significant differences in the structure and approaches to handling complaints result from the IHS decision to divide EEO responsibilities between Headquarters East and Oklahoma City. The delegation of authority has resulted in considerable differences regarding the acceptance of formal EEO complaints between Headquarters East and Oklahoma City. Inconsistencies also exist in IHS' 12 Area Offices. The Area Directors make their own EEO staffing decisions, determining whether or not to have an on-site, full-time EEO manager and/or counselors.

The IHS EEO Program Lacks Direction, Potentially Weakening its Effectiveness

The IHS has no systematic way of knowing whether their counselors or staff act appropriately on individual complaints. Neither the Headquarters East director nor the Oklahoma City EEO manager directly supervise EEO activities occurring in Area Offices or Service Units. There is a lack of uniformity in record keeping and retention, resulting in the inability to determine timeliness in the EEO complaint process.

Management involvement in individual EEO complaints represents a conflict of interest and undermines confidentiality. In many cases, EEO staff, counselors, or others involved with EEO informal complaints routinely provide specific case information to the Area or Service Unit Director. Despite requirements that the EEO process be separate from personnel functions, we found IHS' personnel office staff directly involved in the handling of EEO complaints in several Area Offices. Appearances of conflict of interest, even if inaccurate, raise questions about EEO's impartiality.

Many EEO staff and counselors believe that they need intermediate level or refresher training to advance or maintain their skills. Most EEO training is restricted to management staff.

We found no evidence of any periodic self-evaluations by IHS of its own EEO process.

Employee Distrust of EEO Is Widespread Throughout IHS and Undermines Effectiveness of the EEO Process

There is widespread fear of reprisal among many IHS employees. Nearly two-thirds of the respondents, including some supervisory staff, indicated that they would not feel comfortable filing an EEO complaint. In addition, most IHS staff is unaware of IHS' upper management support of and commitment to EEO principles.

RECOMMENDATIONS

In order to address the issues identified in this report, IHS should:

Address IHS-specific Issues Pertaining to Indian Preference, Commissioned Corps, Tribal Compacting/contracting and Downsizing

Standardize the Handling of EEO Complaints

Improve Counselor Performance and Supervision

Standardize Complaint Reporting, Recording, and File Retention

Implement Policy Guidance on Confidentiality

Eliminate Conflicts of Interest and the Potential for Conflicts of Interest

Improve Communication and Expand EEO Training and Educational Opportunities to All IHS Employees, EEO Staff and Counselors

Increase Employee Trust in the EEO Process

We provide specific details on how these recommendations can be carried out in the recommendations section at the end of the report.

In order to ensure proper oversight and accountability, we also recommend that ASMB should:

Perform a Follow-up Evaluation and Periodic Reviews on the Implementation of the OIG Recommendations

AGENCY COMMENTS

We received comments on the draft report from the Indian Health Service (IHS) and the Assistant Secretary for Management and Budget (ASMB). Both concur with the vast majority of our 10 recommendations and the 34 ways of achieving them. Where appropriate, we changed the report to reflect their comments. The full IHS and ASMB comments are contained in Appendix B.

The IHS believes our recommendations “will provide opportunities for much needed improvement in the administration and management of the IHS EEO program.” The

IHS' actions to date include development of an EEO website, a Fact Sheet explaining differences between Indian Preference and Title VII discriminatory practices, and new EEO posters. We appreciate the cooperation of IHS in conducting this inspection and look forward to working with IHS in the development of their action plan in response to our recommendations.

Of the 34 ways of achieving the recommendations, IHS did not concur with the following four:

The IHS does not concur with elevating EEO supervisory responsibilities to IHS Headquarters. The IHS responded that they were unclear about the recommended organizational location of upper management. To clarify, we are recommending that an IHS upper manager at Headquarters provide management supervision (line authority) to both the EEO Director in Headquarters East and the EEO manager in Oklahoma City to provide more accountability. We are not recommending line authority over Area EEO Managers through Headquarters staff offices.

The IHS does not concur with our recommendation to implement standardized performance requirements and evaluation methods for EEO managers, staff and counselors which are reviewed/conducted by the EEO Director in Headquarters East and/or the EEO manager in Oklahoma City. It is unclear if IHS disagrees with our recommendation to implement performance requirements and evaluation methods and/or the line authority for evaluating performance. In either case, in order to measure EEO staff improvement, we believe this recommendation is necessary.

The IHS does not concur with our recommendations to establish a counselor selection criteria and to prohibit managers and personnel staff from becoming counselors. We believe that regardless of whether objectivity can be maintained, having managers and personnel staff who are EEO counselors creates an appearance of a conflict of interest. This is detrimental to the ability of the IHS EEO program to establish an overall sense of trust and impartiality among IHS employees.

The IHS does not concur with our recommendation to ensure that "EEO settlements are paid from a central fund, rather than an Area Director's operating expenses, or otherwise ensure that an Area Director does not have decision-making authority over the settlement amount." We agree with IHS that, "Areas related to each EEO issue should bear the cost of settling those issues." However we believe that it creates a conflict of interest to have the Area Director decide the amount of the award.

The ASMB concurs with the need to improve staff performance. However, they believe there are other ways of achieving staff supplements beside increased staffing levels and suggest that IHS consider term appointments, contracting and job sharing etc. We agree that staff performance can be improved through various mechanisms and would

encourage IHS to utilize any and all available to them.

The ASMB does not concur with the recommendation that IHS ensure that EEO settlements are paid from a central fund, rather than an Area Director's operation expenses. While we agree with ASMB that Area Offices should be held accountable, we stand by our belief that an Area Director's ability to decide the monetary amount of a complaint settlement creates a conflict of interest.

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INTRODUCTION

PURPOSE

To conduct a management review of the Equal Employment Opportunity (EEO) complaints process of the Indian Health Service (IHS).

BACKGROUND

The IHS Director requested that the Inspector General conduct an EEO management review including the following issues: timeliness, management practices, delegations of authority, conflict of interest, confidentiality, and training of EEO personnel at Headquarters and Area Offices.

Legal Responsibility for EEO

The Assistant Secretary for Management and Budget (ASMB) has departmental responsibility to provide technical assistance and policy guidance to the operating divisions (OPDIV). The OPDIV EEO offices are responsible for “establishing and maintaining EEO programs” and processing EEO complaints. According to 29 CFR 1614.102(a)(1), each agency “must provide sufficient resources to its EEO program to ensure efficient and successful operation.” The ASMB has primary responsibility for preparing final agency decisions on formal EEO complaints.

Timeliness

The OPDIVS follow a 9-step process (See Appendix) issued by the Equal Employment Opportunities Commission (EEOC) to handle individual complaints of discrimination. The process outlines complainant, EEO counselor and OPDIV responsibilities and time frames to complete requisite steps in resolving an EEO complaint. The specific time frames for completing EEO actions are specified in 29 CFR 1614.105(a)ff and are defined for EEO staff and counselors in the EEOC’s EEO Management Directive For 29 CFR. Part 1614 (MD-110).¹

¹ Subsequent to our field work, EEOC updated MD-110. The new MD-110 issuance endorses the principles we cite and provides additional support for some of our recommendations. All MD-110 citations shown in this report reflect those in place at the time of our field work.

Management Practices

In early 1999, ASMB released an “EEO Complaints Processing Evaluation Checklist” to EEO directors throughout the Department of Health and Human Services (DHHS). This checklist serves as a guide for measuring effective management of EEO complaints processing and allows OPDIVS and Headquarters staff to evaluate how well they perform their EEO complaints functions. The checklist also provides OPDIVS guidance as to acceptable counselor selection, training and performance, alternative dispute resolution (ADR), and complaint tracking and reporting. In addition, according to 29 CFR 1614.102(a)(11), each agency must “establish a system for periodically evaluating the effect of the agency’s overall EEO effort.”

Delegations of Authority

According to 29 CFR 1614.607, an agency head may delegate EEO authority to one or more designees. In 1997, IHS delegated EEO responsibility for the Albuquerque, Navajo, and Oklahoma City Area Offices and Headquarters West to the Oklahoma City Area Office. In 1998, IHS further delegated EEO responsibilities for the Nashville Area Office to Oklahoma City. Headquarters East retained EEO responsibilities for the Aberdeen, Alaska, Bemidji, Billings, Phoenix, Portland, Sacramento, and Tucson Area Offices and Headquarters East.

Each of the twelve Area Directors has the authority to select an EEO Manager and to determine whether the position will be designated as a collateral or full-time position. Two Area Offices have their own full-time EEO Manager: Phoenix and Alaska². Aberdeen and Bemidji share a full-time EEO Manager. Albuquerque, Headquarters West, Nashville, Navajo and Oklahoma City share the full-time EEO Manager in Oklahoma City. The Billings, Sacramento and Tucson Area Offices designate the EEO Manager position as collateral to their regular duties. Most Area Offices and Service Units have at least one EEO counselor on-site who has collateral duties.

Conflict of Interest

Conflict of interest can occur on EEO complaints when those who make policy or are involved in the EEO process improperly insert themselves into the EEO process or fail to recuse themselves when they have a personal involvement in the matter. The MD-110 specifically prohibits several activities:

- any management involvement in individual EEO complaints is inappropriate
- EEO staff are prohibited from acting as advocates for either party involved in an

² Alaska did not have a full-time EEO Manager for 8 months. An EEO Manager was appointed 2 days prior to our visit.

EEO complaint

- the EEO complaint process must be kept separate from the personnel function
- internal investigators cannot be used in certain situations (e.g., particularly sensitive cases involving high officials).

Confidentiality

Confidentiality is guaranteed to employees making informal EEO complaints by 29 CFR 1614.105(g) and MD-110. Both citations require specific authorization by the complainant before a counselor can reveal their identity. Otherwise, anonymity for the complainant cannot be compromised.

Confidentiality is no longer promised once a formal EEO complaint is filed.³ If employees want to file formal complaints, EEO counselors must advise complainants that their complaint file may be shared with those involved in their case who need access to the file. The MD-110, VI, C. 4, states those needing access may include the EEO Officer, agency EEO officials and those identified as being responsible for actions giving rise to the complaint.

Training

The IHS is required to provide all managers and staff information about EEO policies and programs. According to 29 CFR 1614.102(a)(5), agencies must “provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the EEO program.” Similarly, 29 CFR 1614.102(b)(4) requires agencies to “make written materials available to all employees ... informing them of the variety of EEO programs and administrative and judicial remedial procedures available to them.”

Alternative Dispute Resolution

The ADR process intends to resolve EEO complaints through early intervention using an impartial outside party to mediate the issues. An EEO counselor should routinely advise complainants of the availability of ADR services. If the complainant agrees to ADR mediation, a trained mediator will hear the issues involved and work with the involved

³ Technically, informal complaints are “presented” rather than “filed.” For this report, we use “filed” when discussing the informal complaint process since that is how respondents described the process to us.

parties towards a resolution.⁴ The law requires agencies to ensure that parties be “entitled to participate in the selection of an arbitrator.” The mediator’s communications with the involved parties are confidential. If a complaint is resolved through ADR, the complainant cannot file an EEO complaint based on the same issue.

New EEOC rules, effective November 9, 1999, made several ADR changes. Federal agencies now must offer ADR at all stages of the EEO process.

Recent EEO Reviews at IHS

In May 1998, the IHS “1998 Employee EEO Survey”⁵ found that additional EEO training is warranted to reduce “anti-feminist and anti-minority” perceptions and attitudes in the IHS workforce. In addition, the types of discrimination most often reported were race (16 percent), gender (13 percent), and sexual harassment (9 percent). A little over half of the respondents (54 percent) indicated they would file an EEO complaint if they felt they had been discriminated against and the majority of respondents (69 percent) indicated they would not be hesitant to contact someone in EEO for information and or counseling. Most respondents felt the EEO program was necessary. Finally, there was considerable variation in the respondents’ perception of the degree to which IHS management supports the EEO program.

Numbers of EEO Complaints at IHS

As of May 1999, there are more than 14,000 IHS employees located in 12 Area Offices, individual Service Units, Headquarters East (in Washington, D.C.), and Headquarters West (in Albuquerque, New Mexico). At the end of fiscal year (FY) 1999, IHS reported that EEO counselors handled 220 informal complaints/contacts, a relatively consistent number when compared to the previous 3 years.

If informal EEO counseling does not resolve the matter, aggrieved parties can file a formal complaint. In FY 1999, DHHS employees filed 395 formal complaints. The IHS, National Institutes of Health (NIH) and Food and Drug Administration (FDA) account for nearly 70 percent of the total number of complaints. In FY 1999, IHS employees filed 88

⁴ The Administrative Dispute Resolution Act of 1996 (P.L. 104-320) says that the mediator should be a neutral party and “ may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve. A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.”

⁵ This survey was mailed to a stratified random sample of 1,000 IHS employees with a response rate of 40%.

formal complaints, the second most complaints filed among the DHHS' OPDIVs. Employees of NIH filed 136 formal complaints and FDA employees filed 51.⁶ At the end of FY 1999, IHS had 192 open formal complaints, second only to NIH with 232 open formal complaints.

In FY 1999, IHS employees filed a total of 308 formal and informal EEO complaints. Five Areas accounted for 70 percent of IHS' EEO complaints: Navajo (79), Portland (47), Aberdeen (37), Oklahoma (28), Headquarters East (27).

Bases for EEO Complaints

Under EEO authorities, "organizations must not discriminate against individuals on the basis of race, color, sex, religion, national origin, age or handicap."⁷ The leading categories of discrimination alleged in EEO IHS complaints in FY 1998 were: sex (41), age (36), race (28), and national origin (25). Employees also filed 57 complaints alleging reprisals were taken against them for filing complaints. The issues most frequently raised in the 1998 EEO complaints were harassment, non-sexual (28), EPMS performance appraisal (25), promotion (21), and assignment of duties (18).

SCOPE AND METHODOLOGY

We evaluated the EEO process at Headquarters East and West, all 12 IHS Area Offices, and one Service Unit in each Area we visited. We compared the EEO process at the Area Offices and both Headquarters to the standards established in EEO laws and regulations and to ASMB's "EEO Complaints Processing Checklist." We obtained available documentation for any of the issues IHS requested we reviewed.

The sample included both informal and formal EEO complaints. In Headquarters East and Oklahoma City, we reviewed 31 formal complaint files closed in the last 2 years. We reviewed all of the available informal complaint files closed in the last 2 years at the Area Offices and Service Units, a total of 26 complaints.

In each Area Office, Service Unit and headquarters, we reviewed EEO policies, procedures, complainant files, and any other documentation relating to the six issues we evaluated. At each office, we spoke with all available EEO staff, counselors and IHS employees who had EEO complaints closed in the last 2 years. We also met with Area and Service Unit directors, and a purposively selected sample of managers and other staff. Using structured discussion guides, we interviewed a total of 223 respondents. A

⁶ The NIH has 16,010 employees; the FDA has 9,500 employees.

⁷ Indian Health Service Circular No. 85, Appendix A, pg. 12

breakdown of these respondents follows:

- IHS staff with EEO complaints closed after FY 1997 (20)
- EEO staff and counselors (31)
- EEO managers (10)
- Area and Service Unit directors (24)
- IHS non-management employees (73)
- IHS managers (46)
- IHS upper management (2)
- Others involved in the EEO process including ASMB, the Investigations Manager, the ADR contractor, and Office of General Counsel regional attorneys (17)

We did not review any open EEO complaints. We did not compare the IHS' EEO program to other Department or Federal EEO programs except for numbers of complaints filed.

Our review was conducted in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency.

FINDINGS

The IHS operates under four conditions which complicate the EEO complaints process: Indian Preference, Commissioned Corps, Tribal Contracting/Compacting, and Downsizing

The IHS' unique health care delivery system brings services to many diverse communities. Health care professionals and support staff from native populations, Commissioned Corps officers and others work together to serve Indian health care needs. Laws governing the rights of tribes and Indians sometimes create misconceptions regarding the rights and responsibilities among these groups.

During our on-site visits, we observed several situations pertaining to the EEO program caused by these misunderstandings. These misunderstandings can lead to missed deadlines for filing and/or acting on complaints, wasted time and efforts for EEO staff and counselors, ill feelings among staff, workplace disruption and loss of productivity.

Complaints involving the Indian Preference Law are being handled inappropriately through the EEO process

In our discussions with respondents and observations we made during our site visits, we found that IHS employees are confused about the Indian Preference Law which provides a legal basis for preferential treatment to qualified Indian applicants and employees.⁸ Some non-Indian employees do not realize that Indian preference extends beyond hiring and applies to personnel actions (e.g., promotions). These employees felt they were consistently discriminated against throughout their careers. The EEO remedies do not apply to employees who believe they are treated unfairly primarily as a result of Indian preference being applied. In these complaints, employees should file a personnel grievance or use any other grievance procedure negotiated with a recognized labor organization.⁹ In a few complaints we reviewed, we noticed that EEO counselors handling complaints involving Indian preference as the primary issue and erroneously treating them as EEO matters based on race.

⁸ Civil Rights Act of 1964, Title VII, Section 703(i)

⁹ Indian Health Service Circular No. 87-2.

Commissioned Corps EEO rules are still not understood in IHS, which may cause delays in resolving these EEO complaints

Recent changes in handling EEO complaints from Commissioned Corps officers created confusion among EEO staff and counselors.¹⁰ The DHHS Personnel Instruction issued in August 1999 stipulates that Commissioned Corps officers must now file EEO complaints through the Commissioned Corps EEO process.¹¹ However, from October 1996 to October 1998, Commissioned Corps officers followed the IHS EEO procedure. Many EEO staff and counselors were unsure how to handle these EEO complaints from October 1996 to August 1999 when new procedures for the Commissioned Corps went into effect. Some IHS staff do not understand they have, and have always had, the right to file an EEO complaint against a Commissioned Corps officer.

Even though Commissioned Corps officers are now directed to use their own EEO process under the new procedures, IHS EEO counselors play a role in handling these complaints. Commissioned Corps officers who wish informal resolution of their complaints may either seek informal counseling through the IHS EEO office or may seek informal resolution through the Commissioned Corps' administrative chain.¹² Despite these changes, some IHS employees believe that Commissioned Corps officers are not entitled to use IHS' EEO complaint processes.

Employees' rights to EEO under tribal contracting/compacting have not been legally determined, potentially limiting employees' access to the EEO process

The IHS actions to turn over the operation of IHS facilities to Indian tribes created additional disparities in treating EEO complaints. The Indian Self-Determination and Education Assistance Act affords tribes the option to administer and operate IHS health services and programs in their communities, or remain in the IHS direct health system.¹³ When tribes assume operations of these facilities, IHS employees working there become contracted Federal employees of the tribe. The right of contracted Federal employees to access IHS EEO has not been legally determined. Headquarters East EEO believes that contracted employees are not covered, while other IHS managers and regional attorneys feel that these employees have a legal claim to IHS EEO services. The Alaska Area Office makes EEO services available to employees under tribal management while other Area EEO offices do not.

¹⁰ Nearly one of seven IHS employees is a Commissioned Corps officer.

¹¹ The Commissioned Corps Personnel Manual Regulation CC46.1, p. 2

¹² Ibid., p. 7

¹³ Public Law 93-638, as amended

Downsizing restricted access to EEO services in some areas

Although IHS' workforce has remained relatively constant since 1993, there has been a reduction in the numbers of staff at Headquarters and Area Offices by more than 50 percent. As noted in the background, the level of EEO complaints has remained relatively constant, but there are now fewer EEO staff and counselors available to handle these complaints. In looking for ways to consolidate positions during downsizing, IHS' upper management allowed Area Offices to determine what duties would remain. Consequently, each Area Office could determine how to staff the EEO position. Two Area Offices employ a full-time EEO manager while three Area Offices staff the position as a collateral duty. Six Area Offices and Headquarters West share the services of an EEO manager.

Inconsistencies in the EEO system result in unequal treatment of complaints

Significant differences in the structure and approaches to handling complaints result from IHS' dividing EEO responsibilities between Headquarters East and Oklahoma City and from Area Directors making their own EEO staffing decisions. All Area Offices reporting to Headquarters East use an Area EEO manager and contracted investigators for all formal EEO complaints. In contrast, Area Offices under Oklahoma City use the Oklahoma City EEO manager to manage their EEO process. Instead of a full-time EEO manager, areas under Oklahoma City have either individual EEO counselors or employee relations specialists who serve as local EEO contacts. In addition, these offices primarily use an EEO specialist in Oklahoma City to investigate formal complaints

Acceptance of EEO complaints varies

Based on our interviews and complaint reviews, there appears to be considerable differences regarding the acceptance of formal EEO complaints between Headquarters East and Oklahoma City. Oklahoma City routinely rejects complaints for timeliness or other procedural reasons, while Headquarters East sometimes accepts complaints that do not always meet these standards. Several IHS managers and regional attorneys volunteered that Headquarters East readily accepts complaints that do not have an EEO basis for complaint.

Throughout IHS, many EEO staff and counselors' understanding differs about what constitutes a basis for an EEO complaint. Several regional attorneys believe that many EEO complaints are accepted that have no "legal merit." Area Offices differ in the way sexual harassment issues are handled as well. One Area Office treats sexual harassment

as a conduct issue, rather than an EEO issue.¹⁴ Consequently, unlike sexual harassment complainants in other IHS sites, complainants in this area have no EEO redress for their complaints.

Little alternative dispute resolution is being used to resolve EEO complaints

We found little evidence of ADR being practiced. The DHHS urges its OPDIVS to institute ADR processes aimed at resolving issues at the lowest possible level to avoid protracted and expensive litigation. To provide mediation services during the informal complaint process, IHS contracts with the Departmental Appeal Board Mediation Program (DABMP). In FY 1999, DABMP mediated 9 IHS complaints, a decrease from 12 complaints the prior year and used \$22,500 of the \$65,000 allotted for travel to provide mediation services for IHS employees.

The Phoenix Area Office employs a EEO complaint resolution process not used in other Area Offices or Service Units. There, the EEO counselor meets with complainants to determine if a valid EEO issue exists or if another type of grievance should be filed. If the counselor decides an EEO issue exists, the complaint is presented to a five-member management committee to determine what steps should be taken. If complainants are not satisfied with the results, they can file formal EEO complaints. While this model has been touted by Headquarters East to be an ADR model, this process does not follow conventional ADR principles and improperly involves management in the process.¹⁵

Timeliness cannot be accurately determined due to the inconsistency and unavailability of records

We were able to review some closed formal complaint files. In these cases, the dates recorded in the files indicated the cases were handled in a timely manner. However, several respondents reported instances where there were delays in processing their informal EEO complaints. One complaint we reviewed showed that an EEO manager did not respond to an initial complaint made via e-mail until the complainant followed up months later. Respondents had considerably more negative comments concerning timely actions and resolution on formal complaints than on informal complaints.

¹⁴ According to Section 703, Title VII of the Civil Rights Act of 1964, as amended, sexual harassment is a form of discrimination for which an EEO complaint can be filed.

¹⁵ Recent EEOC guidance explains that involving supervisors in the mediation process may lead employees to “feel that officials within the chain of command will more readily believe the supervisor’s version of events.” In the case of *Cheng-Canindin v. Renaissance Hotel Associates, et.al.*, the California Supreme Court held that a review panel consisting of managers and chosen without input from a complainant is “inherently slanted in management’s direction.” (98 Daily Journal D.A.R. 13193)

The lack of uniformity in documentation and record retention on informal cases by EEO counselors is problematic. We attempted to review informal complaint files at Area Offices or Service Units. Files were unavailable in some sites and we could not always determine the timeliness or appropriateness of actions taken on complaints we reviewed.

Collateral duties affect EEO counselors' ability to complete their actions in a timely manner. Nearly all EEO counselors we spoke with have collateral duties. As a result, their EEO responsibilities are secondary to their primary jobs. Collateral duties add to the difficulty in coordinating meetings with complainants and supervisors. All parties involved may have different leave, travel or work schedules which can contribute to problems in meeting the mandated deadlines to respond to EEO complaints.

Complaint reporting system is flawed

The ASMB guidance to OPDIVS calls for a tracking system to help manage the complaints process. At a minimum, the system should be able to “track and report ... case status, prevent cases from getting lost, allow any staff member to find cases to provide quick and accurate status reports, and identify problems or potential problems in work flow.”

The IHS listing of which EEO complaints are open or closed is inaccurate. In our attempts to review closed formal complaint files in Headquarters East and Oklahoma City, we found that nearly one-third of the “closed” complaints we tried to review from that listing were still open.

The EEO Area Offices maintain and track informal EEO complaints in different ways. The EEO counselors usually report to their EEO manager both when they receive an informal complaint and when they complete their fact-finding. But, when a complaint proceeds to the formal stages, Headquarters East does not routinely advise EEO managers in the Area Offices. Similarly, the Oklahoma City EEO manager does not inform counselors that a complaint has been accepted or rejected as a formal EEO complaint or provide updates of the complaint status or final outcome.

The lack of a uniform reporting and tracking system also results in notification problems for EEO complainants and others. Very often, complainants do not know the status of their complaints and may not hear how their complaints are resolved.¹⁶ If not informed of the outcome of their informal complaints, complainants do not know whether or when they may file a formal EEO complaint. Those charged with discrimination may also be unaware of the complaint outcome. At the formal stages, not informing involved parties

¹⁶ In one site we visited, the human resource person who handles informal EEO complaints advised that she tells complainants they may never hear how their complaint is resolved. A complainant verified this process during our interview.

of the status of their complaint can have repercussions involving filing appeals and the continued disruption to the workplace environment. At present, MD-110 does not require this notification.

The IHS EEO program lacks direction, potentially weakening its effectiveness

IHS management has no systematic oversight of EEO staff or counselors

The IHS EEO managers have no systematic way of knowing whether their staff or counselors act appropriately on individual informal or formal complaints. Only two Area Office EEO managers exercise direct oversight of their counselors' EEO activities. They provide regular guidance for EEO policies and procedures, opportunities for training, monitor progress on individual complaints, and remind counselors of processing deadlines. Neither Headquarters East nor the Oklahoma City EEO manager directly supervise EEO activities occurring in Area Offices or Service Units.

This lack of supervisory control allows counselors to unknowingly make incorrect decisions or conduct themselves in an unprofessional manner. Some respondents said that some EEO counselors see themselves as either advocates or investigators, instead of impartial fact-gatherers. A regional attorney pointed out that EEO counselors should not be making findings of discrimination. Such improper actions make it very difficult, if not impossible, for DHHS to defend itself and may cost the agency considerable funds in settlements. Several complainants said that during the course of settling their complaints, EEO staff raised their voices at them, trying to threaten or intimidate them.

The lack of IHS management direction over EEO counselor selection results in an imbalance of counselor coverage throughout IHS. Not all Area Offices or Service Units have EEO counselors. While ASMB guidance to OPDIVS states that "procedures should be in place to replace counselors as needed," IHS does not use a consistent method or particular protocol or criteria to select EEO counselors, nor specify the time allowed for EEO activities.

Due to IHS' decentralization, Area Directors and some Service Unit Directors now exercise considerable influence over EEO activities. They hire EEO managers, counselors and support staff, approve training and travel and allocate physical space for EEO staff and counselors. In some instances the Area Director or Service Unit Director appoints staff members to include EEO counseling as collateral to their regular duties. In

other sites, counselors volunteer or are elected to assume EEO duties in addition to their regular jobs.

Some respondents feel that IHS management does not provide sufficient technical direction to EEO staff and counselors. A Headquarters East EEO respondent said their office does not provide unsolicited guidance to the field. Some respondents indicated that the EEO system does not respond to their technical needs and that there is a communications gap between EEO management and Area staff. Many Area Office and Service Unit EEO staff and counselors have infrequent contact with the EEO director in Headquarters East or the EEO manager in Oklahoma City.

We found no evidence of any periodic self-evaluation by IHS of its own EEO process, although ASMB recently provided all OPDIVS with an EEO self-evaluation tool. Although IHS sampled some employees' opinions in the "1998 Employee EEO Survey," they did not disseminate the survey results to EEO staff and counselors, or to other IHS managers and staff.

Management involvement in individual EEO complaints is a conflict of interest and raises questions about EEO's impartiality

The delegation of authority to Area Directors for EEO gave Area Directors line authority over EEO staff in their offices. In many cases, EEO staff, counselors, or others involved with EEO informal complaints routinely provide specific complaint information to the Area or Service Unit Director. In one file we reviewed, the EEO manager informed the Service Unit Director by letter of the status of the informal complaint. In some Areas, the EEO manager, or in one case, a personnel specialist who tracks EEO complaints for the Area, routinely meets with the Area Director to provide detailed individual updates on formal and informal complaints. The delegation of authority regarding EEO matters from IHS Headquarters to its Area Directors cannot encompass this extent of involvement on individual cases and is prohibited by 29 CFR 1614.105(g).

Many IHS employees, both staff and management, told us they feel that the EEO staff and process are biased. Area Directors must approve any EEO settlement of complaints involving managers in their Area, unless a settlement amount exceeds \$10,000. Some respondents expressed the feeling that since any monetary settlement on these EEO complaints must be paid from Area Director's operating funds, it may be difficult for the Area Director to be objective in these cases.

Some respondents expressed concern that EEO counselors do not understand conflict of interest or how to handle an EEO complaint when conflict of interest is an issue. As mentioned above, some EEO staff and counselors see themselves as advocates for either complainants or management. According to MD-110, "EEO counselors, EEO officers, and EEO managers cannot serve as representatives for complainants or for agencies in

connection with the processing of discrimination complaints” as it is “inconsistent with their neutral roles.” Appearances of conflict of interest, even if inaccurate, raise questions about EEO’s impartiality.¹⁷ Two-thirds of the IHS respondents and 43 percent of the EEO staff and counselors said they are unfamiliar with the policy on conflict of interest.

Personnel’s involvement with EEO is improper.

Despite MD-110, which stipulates that the EEO process be separate from personnel functions, we found IHS’ personnel office staff directly involved in the handling of EEO complaints in several Area Offices. Conflicts of interest between personnel and EEO exist because many EEO complaints arise out of personnel actions. Most EEO counselors and managers are unaware that these types of conflict of interest represent a potential problem in handling EEO complaints. In some cases, personnel staff investigate EEO complaints.

Use of an in-house investigator appears to be a conflict of interest.

According to MD-110, an EEO investigator should not occupy a position in the agency that is “directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose.” This language may prohibit the EEO specialist from investigating complaints in the Oklahoma Area, all areas using Oklahoma City EEO services, and/or those naming the Area Director(s) in the complaint. Oklahoma City’s use of an EEO specialist to investigate formal EEO complaints may represent a conflict of interest and an inability to “maintain the appearance of being unbiased.”¹⁸

EEO staff and counselors feel they need additional training to effectively perform their jobs

More than half of the EEO staff and counselors (57 percent) believe that they need intermediate level or refresher training to advance or maintain their skills. Nearly half of the EEO counselors (49 percent) said that they had not received any training in several years. One Service Unit EEO counselor said that he had to convince his supervisor to pay for EEO training out of their department’s training funds, since there was no EEO money available for training. This long-time counselor is resigning from his counselor duties, in part because of IHS’ failure to provide additional training.

The ASMB guidance to OPDIVs indicates that agencies should review the adequacy of

¹⁷ In *Ceriale v. Amco Insurance Company*, the California Supreme Court vacated an arbitrator’s decision, based in part on their consideration of “whether the record reveals facts which might create an impression of possible bias.” (96 Daily Journal D.A.R. 9847)

¹⁸ Management Directive-110, 5-5 C.

training provided to counselors and to provide refresher training if it is needed. The IHS does not mandate training for its counselors beyond the basic EEO counselor training. The IHS does not require its EEO counselors to receive a core of training classes, nor to periodically test to certify their competency. Some counselors are unsure of handling certain issues. Counselors identified the following training needs: sexual harassment complaints, personnel issues, formal complaints, report writing, EEO law, mediation, ADR dispute resolution, the non-EEO grievance processes, and the bases for complaints handled by EEOC.

Coordinating training is sometimes difficult for EEO counselors with collateral duties. For many Service Unit counselors involved in direct patient care, finding both time to attend training and someone to perform their collateral duties becomes problematic. Further, supervisors may be hesitant to grant them time away from their primary responsibilities to attend training and fulfill their EEO duties.

Many IHS non-supervisory staff do not receive EEO training. Counselors indicated that they are frequently faced with personnel grievance or working condition complaints from staff that do not qualify as a basis for an EEO complaint. Many of the respondents we spoke with were unaware who their EEO counselors are,¹⁹ what actions might constitute an EEO violation, or what their EEO rights are. Much of the EEO training is restricted to management staff. Although managers may be required to attend these sessions, their work schedules may interfere with their ability to attend scheduled EEO training.

Employee distrust of EEO is widespread throughout IHS and undermines its effectiveness

Confidentiality is compromised

Some Area and Service Unit Directors require identifying details from EEO managers or counselors when informal EEO complaints are filed. This violates EEO rules of confidentiality. Area and Service Unit Directors may wish to be informed when their managers may have stepped out of line or want to protect the complainant against reprisals. However well-intentioned, unless the complainant has waived their right of confidentiality, this notification is improper.²⁰ The IHS also violates EEO complainant confidentiality in its sexual harassment “zero tolerance” policy. This policy requires that Area Directors, Service Unit Directors and EEO managers are to be notified of specific complaint details when an informal sexual harassment EEO complaint is filed.

¹⁹ The ASMB guidance to OPDIVS suggests one way to measure effectiveness is to determine if EEO counselors’ names and telephone numbers are publicized to employees.

²⁰ MD-110, Attachment A, Section A.1.a., pp 2-27.

Many respondents do not understand the EEO confidentiality standards. Although many respondents said that complainants and supervisors named in a complaint most often violate confidentiality on their complaint, several respondents said that EEO counselors and staff also violate these standards. Some respondents volunteered that they would not file an EEO complaint because of a perceived lack of confidentiality.

Employees fear reprisals

The EEOC advises Federal agencies must make “assurances that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation.”²¹

Many IHS employees we spoke with feel that filing an EEO complaint will result in a reprisal by management. Employees fear being ostracized, and or stigmatized as troublemakers. Some employees report they are too intimidated to pursue EEO complaints.

Nearly two-thirds of our respondents (62 percent), including some supervisory staff, indicated that they would not feel comfortable filing an EEO complaint, a considerably higher number than indicated in IHS’ 1998 Employee EEO Survey. Some respondents are fearful of approaching EEO counselors with questions and of being seen going to the EEO office. In response to this concern, Alaska Area Office management moved the EEO office to a floor separate from management. One complainant, alluding to potential reprisals, pointed out that reading material on EEO complaint filing that is posted on a hallway bulletin board may not be the best way for employees to learn about the process.

Employees believe that EEO and management are enmeshed

Some employees feel that management plays too great a role in the EEO program and that it is a tool of management. Others fear that the EEO counselor or EEO manager acts as a go-between to management. Others articulated their perception that management usually wins EEO complaints. Some respondents believe that the goal of IHS EEO is to defend the agency.

Further, some employees fear that their confidentiality might be compromised due to management’s role in the EEO process. In a few instances, IHS managers function in the capacity of an EEO counselor. A manager’s participation in this process and knowledge of a complainant’s identity establishes a potential avenue for reprisal or a means to inhibit the process on behalf of management.

²¹ EEOC guidance, June 18,1999 sets out standards of liabilities for employers for unlawful harassment by supervisors.

A few respondents indicated that they would pursue their EEO complaints elsewhere or take it to a higher level rather than at the Service Unit, because they did not believe they would get needed support. In some cases, management prevented employees from seeing the EEO manager or counselor. One manager required that an employee provide a week's notice before approving time for the employee to see an EEO counselor.

The IHS upper management plays little role in ensuring that EEO program goals are communicated and accomplished. One Headquarters East manager indicated that most IHS managers support EEO, but because IHS is highly decentralized, upper management needs to get the EEO message to all managers and staff. The bulk of the employees are at the Service Unit and any IHS message of EEO support does not get to the field offices.

RECOMMENDATIONS

The IHS EEO system functions with little oversight and direct guidance on implementing and executing EEO policies and procedures. The structure and management of IHS' EEO program contribute to problems concerning confidentiality, conflict of interest, reprisals and management's involvement in the EEO process. Problems include a lack of management direction and oversight, inconsistent and inaccurate reporting system, minimal communication, and inadequate training. In addition, most IHS staff is unaware of IHS' upper management support of and commitment to EEO principles.

Many respondents conveyed a lack of confidence in the EEO program. They are intimidated and hesitant to use the system intended to protect their employment rights. Employees' perceptions about the process, confidentiality and impartiality are vital to sustaining a credible, viable EEO program. Employees must feel they can pursue a complaint with the confidence that it will be handled fairly, timely and confidentially by a well-trained EEO counselor, and that no adverse actions will be taken against them. Without overcoming widely-held perceptions of distrust, IHS' EEO program cannot succeed.

In order to have a more consistent, unified EEO program and complaints processing system which addresses the difficulties outlined above, we recommend that IHS:

Address IHS-specific issues pertaining to Indian preference, commissioned corps, tribal compacting/contracting and downsizing

- Issue a memo to all employees explaining the differences between Indian Preference and discriminatory practices
- Issue a memo to all employees detailing the process for Commissioned Corps employees to file a complaint and the right to lodge complaints against Commissioned Corps employees
- Obtain legal advice from the Office of the General Counsel and a definitive ruling on the status of employees working under a Memorandum of Agreement with Tribal Organizations and their EEO rights
- In consultation with ASMB, and based on comparisons with other Federal and Departmental agencies, provide firm guidance on the ratio of EEO counselors to staff, ensure that these counselors are hired and trained and that they are replaced timely when vacancies occur

Standardize the handling of EEO complaints

- Clarify and codify the roles and responsibilities of Headquarters East and Oklahoma City to their areas and each other
- Provide upper management supervision to both the EEO Director in Headquarters East and the EEO manager in Oklahoma city
- Communicate and convey in a clear manner the bases for EEO complaints, the process to pursue complaints, and how to handle all issues including timeliness, confidentiality, and conflict of interest to all EEO staff and counselors
- Develop a specific ADR policy and process that is made available to all employees

Improve counselor performance and supervision

- Increase EEO staffing levels, requirements and support to include at a minimum:
 - ▶ A full-time EEO manager in each Area Office, reporting to Headquarters East or Oklahoma City
 - ▶ A full-time EEO counselor in each Area Office and/or a full-time counselor who serves the entire Area or more than one Service Unit
- Implement performance requirements and a standardized method for evaluating counselor performance for EEO managers, staff and counselors which are reviewed/conducted by the EEO Director in Headquarters East and/or the EEO manager in Oklahoma City
- Establish counselor selection criteria — managers and personnel staff should not be counselors

Standardize Complaint Reporting, Recording, and File Retention

- Standardize EEO policies and procedures for maintaining complaint data throughout EEO including an update of the 1985 EEO Policy Circular
- Create a standardized system so Headquarters and EEO field staff can track complaint status and generate reports

Implement policy guidance on confidentiality

- Provide guidance on the role of Area and Service Unit directors in both the informal and formal stages and in sexual harassment cases
- Provide guidelines on the maintenance of counselors' informal notes

Improve management oversight and accountability

- Use ASMB's self-evaluation tool to help ensure the effective management of EEO complaints processing
- Establish both short-term and long-term EEO goals and objectives to restore confidence in the EEO process by:
 - ▶ mounting a national initiative that demonstrates IHS commitment to providing a discrimination-free workplace, where EEO matters can get quickly and fairly resolved
 - ▶ publicizing the availability of counseling services and training
 - ▶ regularly evaluating EEO goals and objectives
- Provide sufficient staff in Headquarters East and Oklahoma City to carry out the recommendations contained in this report

Eliminate conflicts of interest and the potential for conflicts of interest

- Seek legal advice about the extent of EEO investigations allowed to be performed by an EEO specialist
- Ensure that EEO settlements are paid from a central fund, rather than an Area Director's operating expenses, or otherwise ensure that an Area Director does not have decision-making authority over the settlement amount

Improve communication and expand EEO training and educational opportunities to all IHS employees, EEO staff and counselors including

- Conduct a annual national meeting for EEO staff and counselors
- Conduct regular area-wide regional meetings for EEO staff and counselors
- The EEO manager in Oklahoma City, the EEO Director and Headquarters EEO staff should regularly visit all Area Offices
- The EEO manager in Oklahoma City, the EEO Director and Headquarters EEO staff should regularly communicate with Area Office EEO staff and counselors through e-mail, bulletins and training
- The EEO staff and counselors in Area Offices and Service Units should hold regularly scheduled information sessions, and updates to staff
- Assemble a comprehensive reference book for EEO counselors with information specific to IHS EEO concerns
- Establish an IHS-wide EEO web site
- Conduct training focusing on the bases for complaints and an explanation of the EEO process
- Establish a counselor training curriculum
- Conduct training to counselors at regular interval
- Conduct training that includes complaint prevention activities

- Offer interactive training for supervisors unable to attend in person because of work requirements or leave

Increase employee trust in the EEO process

- Management must demonstrate through both words and actions a “zero tolerance” for reprisals
- Increase and make more visible upper management’s commitment and support of the EEO program

In order to ensure proper oversight and accountability, we also recommend that ASMB’s Office of Human Resources EEO Programs Group provide technical assistance and guidance, as well as regular evaluations of IHS’ progress towards meeting their EEO goals and objectives. We recommend that:

The ASMB EEO programs group should complete a 1 year follow-up evaluation on the implementation of the OIG recommendations and perform subsequent annual reviews

AGENCY COMMENTS

We received comments on the draft report from the Indian Health Service (IHS) and the Assistant Secretary for Management and Budget (ASMB). Both concur with the vast majority of our 10 recommendations and the 34 ways of achieving them. Where appropriate, we changed the report to reflect their comments. The full IHS and ASMB comments are contained in Appendix B.

The IHS believes our recommendations “will provide opportunities for much needed improvement in the administration and management of the IHS EEO program.” The IHS’ actions to date include development of an EEO website, a Fact Sheet explaining differences between Indian Preference and Title VII discriminatory practices, and new EEO posters. We appreciate the cooperation of IHS in conducting this inspection and look forward to working with IHS in the development of their action plan in response to our recommendations.

Of the 34 ways of achieving the recommendations, IHS did not concur with the following four:

The IHS does not concur with elevating EEO supervisory responsibilities to IHS Headquarters. The IHS responded that they were unclear about the recommended organizational location of upper management. To clarify, we are recommending that an IHS upper manager at Headquarters provide management supervision (line authority) to both the EEO Director in Headquarters East and the EEO manager in Oklahoma City to provide more accountability. We are not recommending line authority over Area EEO Managers through Headquarters staff offices.

The IHS does not concur with our recommendation to implement standardized performance requirements and evaluation methods for EEO managers, staff and counselors which are reviewed/conducted by the EEO Director in Headquarters East and/or the EEO manager in Oklahoma City. It is unclear if IHS disagrees with our recommendation to implement performance requirements and evaluation methods and/or the line authority for evaluating performance. In either case, in order to measure EEO staff improvement, we believe this recommendation is necessary.

The IHS does not concur with our recommendations to establish a counselor selection criteria and to prohibit managers and personnel staff from becoming counselors. We believe that regardless of whether objectivity can be maintained, having managers and personnel staff who are EEO counselors creates an appearance of a conflict of interest. This is detrimental to the ability of the IHS EEO program to establish an overall sense of

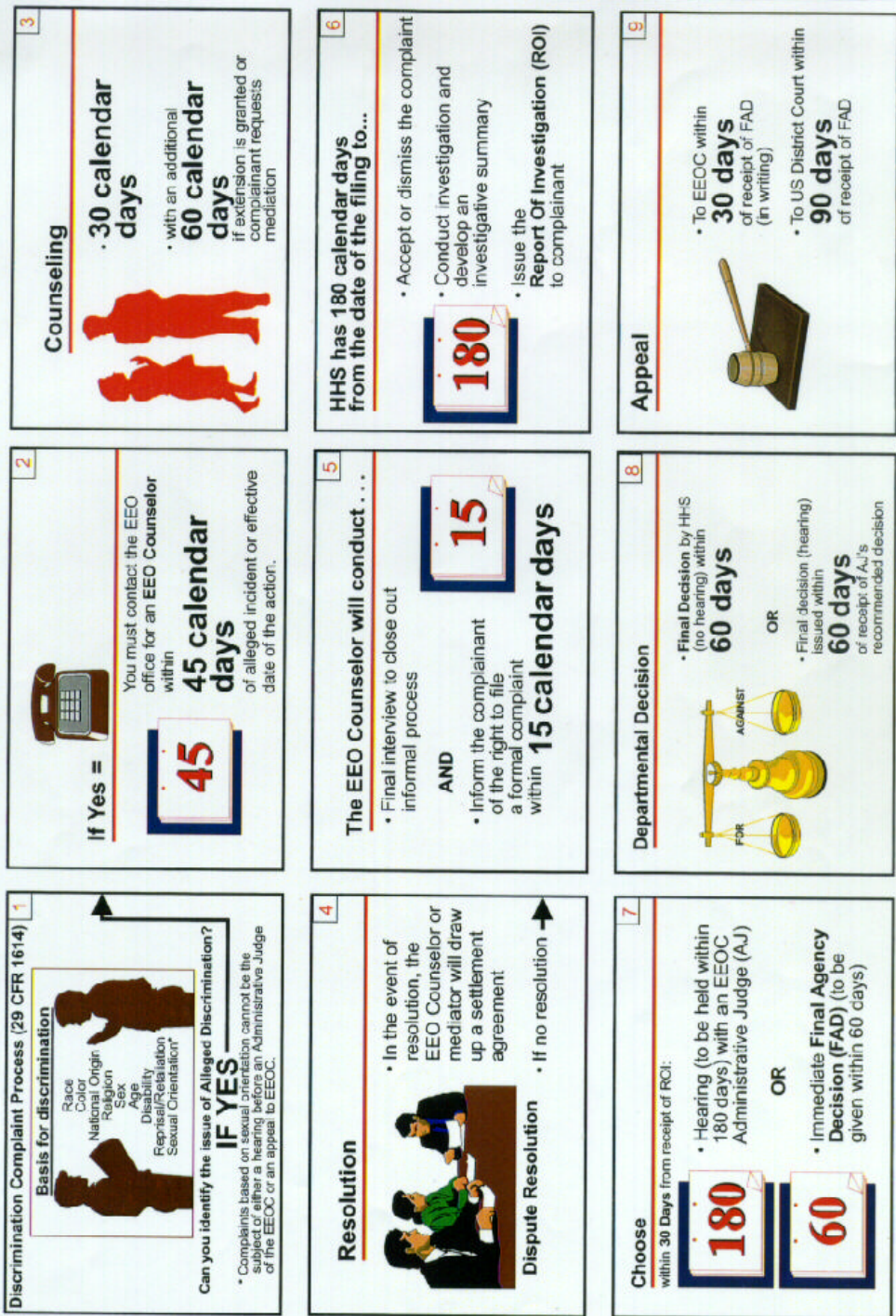
trust and impartiality among IHS employees.

The IHS does not concur with our recommendation to ensure that “EEO settlements are paid from a central fund, rather than an Area Director’s operating expenses, or otherwise ensure that an Area Director does not have decision-making authority over the settlement amount.” We agree with IHS that, “Areas related to each EEO issue should bear the cost of settling those issues.” However we believe that it creates a conflict of interest to have the Area Director decide the amount of the award.

The ASMB concurs with the need to improve staff performance. However, they believe there are other ways of achieving staff supplements beside increased staffing levels and suggest that IHS consider term appointments, contracting and job sharing etc. We agree that staff performance can be improved through various mechanisms and would encourage IHS to utilize any and all available to them.

The ASMB does not concur with the recommendation that IHS ensure that EEO settlements are paid from a central fund, rather than an Area Director’s operation expenses. While we agree with ASMB that Area Offices should be held accountable, we stand by our belief that an Area Director’s ability to decide the monetary amount of a complaint settlement creates a conflict of interest.

Discrimination Complaint Process (29 CFR 1614)





JUN - 6 2000

Indian Health Service
Rockville MD 20857

To: Inspector General


From: Director

Subject: Comments on the Office of Inspector General Draft Report "The Indian Health Service Equal Employment Opportunity Complaints Process", OEI-05-99-00290

The Office of Inspector General (OIG) review of the Indian Health Service (IHS) Equal Employment Opportunity (EEO) process has been both welcome and useful. The draft report contains many recommendations which have already been implemented. These recommendations will provide opportunities for much needed improvement in the administration and management of the IHS EEO program. Attached are IHS' comments on the recommendations. We have also included a separate section of technical comments at the end of the report for your review.

For each recommendation, we have indicated our concurrence or non-concurrence. In addition, we have identified our progress to date on the implementation of the recommendations, where appropriate. We concur with the majority of the recommendations. However, we do not concur with four of the recommendations. These four recommendations involve issues of IHS Area autonomy and delegations of authority. The IHS operates in a decentralized manner, and administrative responsibilities and authorities have been, and will continue to be delegated to the Area Directors as much as possible. The issues addressed in the recommendations with which we disagree involve the centralization of fund management, where funds have been previously allocated to Areas, and the elevating to IHS Headquarters of supervisory responsibilities, where these authorities currently reside with the Area Directors.

We are available to discuss our comments with you at your earliest convenience. Please contact Ms. Jeanello Raybon, IHS Audit Liaison, at 301-443-4137 to schedule a meeting, or if you have any questions about this response. We appreciate the opportunity to review this draft report and to provide comments.


Michael H. Trujillo, M.D., M.P.H., M.S.
Assistant Surgeon General

Attachments

**INDIAN HEALTH SERVICE COMMENTS ON THE OIG DRAFT REPORT
THE IHS EEO COMPLAINTS PROCESS
(OEI-05-99-00290)**

OIG Recommendation #1

Address IHS-specific issues pertaining to Indian preference, commission corps, tribal compacting/contracting and downsizing.

1.a. Issue a memo to all employees explaining the differences between Indian Preference and discriminatory practices.

IHS Response - We concur. In May 2000, in consultation with the HHS Office of General Counsel, IHS developed a Fact Sheet explaining the differences between Indian Preference and Title VII discriminatory practices. This Fact Sheet will be distributed to all IHS employees. In addition, it will be signed by each complainant after each counseling session. OGC will keep IHS apprised of new case development(s) in this area. In addition, IHS has developed a web site for employees to access EEO information. All IHS employees have been notified of the EEO web site. The address is: <http://www.eeo.ihs.gov>. Explanation of the differences between Indian preference and discriminatory practices are included on the web site. The information on the web site will be updated as appropriate.

1.b. Issue a memo to all employees detailing the process for commissioned corps employees to file a complaint and the right to lodge complaints against commissioned corps employees.

IHS Response - We concur. The Division of Commissioned Personnel (DCP) distributed the Commissioned Corps Personnel Manual Instruction to all PHS Commissioned Corps officers on November 19, 1999. DCP is also in the process of developing its commissioned corps web site that will further communicate the commissioned corps complaints process to all officers. The IHS EEO web site will link to the DCP web site. DCP will be sharing more information on the commissioned corps complaint process in their July 2000 Newsletter entitled: "Commissioned Corps Bulletin." In addition, the new EEO posters reflect the availability of the commissioned corps complaint process. It should be noted that all EEO complaints by commissioned corps officers or Civil Service employees, are filed against the Agency (in this case, it would be the Secretary of HHS) and not against an individual employee.

1.c. Obtain legal advice from the Office of the General Counsel and a definitive ruling on the status of employees working under a Memorandum of Agreement with Tribal Organizations and their EEO rights.

IHS Response - We concur. During the May 2000 IHS EEO Conference, IHS discussed

with OGC the status of PHS Commissioned Corps officers working under MOAs with tribal organizations, as well as the status of civil service employees working with tribal organizations pursuant to agreements under the Intergovernmental Personnel Act. The OGC advised that there can be no answer to the general question as to their coverage by anti-discrimination legislation and that each case must be reviewed individually. The OGC strongly recommended that IHS endeavor to complete the EEO counseling process for all federal employees who request EEO counseling; the legal status of the employees will be better addressed at the acceptance or dismissal stage with OGC advice as appropriate. A significant problem that has occurred is with the enforcement of the remedies against the tribal organization that result from favorable judgements for the employee. The IHS does not have the authority to specifically direct or control the day-to-day management of tribal organizations. The IHS will continue to consult with OGC, as appropriate, on specific courses of action.

1.d. In consultation with ASMB, and based on comparisons with other Federal and Departmental agencies, provide firm guidance on the ratio of EEO counselors to staff, ensure that these counselors are hired and trained and that they are replaced timely when vacancies occur.

IHS Response - We concur. We agree that adequate staffing is important. Specific staffing decisions for each organizational location will be made based on the availability of IHS resources, ensuring that IHS is in compliance with EEO standards. During FY 2000, IHS will develop target EEO staff ratios in consultation with tribes, IHS Areas, and local unions as appropriate. These ratios may vary among IHS Areas depending on the percentage of directly operated programs vs. tribally operated programs in each Area.

OLG Recommendation #2

Standardize the handling of EEO complaints.

2.a. Clarify and codify the roles and responsibilities of Headquarters East and Oklahoma City to their Areas and each other

IHS Response - We concur. Existing delegations of authority are being reviewed for possible revision, expansion, or further clarification. The IHS will clarify and codify the roles and responsibilities of the Headquarters EEO manager and Oklahoma City EEO personnel, within their respective areas of responsibility, and between the two offices.

2.b. Provide upper management supervision to both the EEO Director in Headquarters East and the EEO manager in Oklahoma City

IHS Response - It is unclear as to the organizational location of "upper management" in

this recommendation (Headquarters EEO Manager, Area Director, etc.) Is the OIG recommending line authority over Area EEO managers to be through Headquarters staff offices? As an HHS Operating Division, the IHS has delegated as many administrative responsibilities as possible to Area Directors. The trend will continue to be in the direction of more delegation to Area Directors. This recommendation is inconsistent with this principle. Therefore, we do not concur.

2.c. Communicate and convey in a clear manner the bases for EEO complaints, the process to pursue complaints, and how to handle all issues including timeliness, confidentiality, and conflict of interest to all EEO staff and counselors

IHS Response - We concur. (See response to recommendation 1.a. above)

2.d. Develop a specific ADR policy and process that is made available to all employees

IHS Response - We concur. Over 10,000 brochures on the IHS ADR process were printed on November 8, 1999, and made available to employees as HHS Departmental Appeals Board staff conducts training IHS-wide. The IHS EEO web site contains this same information. The IHS ADR process is available to all employees (both commissioned corps and Civil Service). The IHS ADR process, under Memorandum of Understanding with the Departmental Appeals Board, ADR Division, can be utilized during both the informal and formal stages of the complaint process. It should be noted that this ADR process is available IHS-wide, but each respective Area EEO office utilizes their local resources also to mediate employment disputes.

OIG Recommendation #3

Improve counselor performance and supervision

3.a. Increase EEO staffing levels, requirements and support to include at a minimum:

- 1. A full-time EEO manager in each Area Office, reporting to HQEast or OK City;*
- 2. A full-time EEO counselor in each Area Office and/ or a full-time counselor who serves the entire Area or more than one Service Unit*

IHS Response - We concur. See response to recommendation 1.d. above.

3.b. Implement performance requirements and a standardized method for evaluating counselor performance for EEO managers, staff and counselors which are reviewed/conducted by the EEO Director in Headquarters East and/or the EEO manager in Oklahoma City

IHS Response - We do not concur. We believe it is important to maintain the existing line authority over Area EEO counselors by Area EEO officers in each respective IHS

Area Office. See response to Recommendation 2.b. above.

3c. *Establish a counselor selection criteria- managers and personnel staff should not be counselors.*

IHS Response - We do not concur. We agree that in some cases managers and personnel staff may pose a conflict of interest. However, in other cases they may be an appropriate choice as counselors. The key is whether or not they can be objective in a particular situation, and their knowledge may be an important resource. A guideline on selection criteria will be developed in accordance with the EEOC Management Directive 110, MD 110 does not prohibit managers and personnel staff from serving as counselors.

OIG Recommendation #4

Standardize complaint reporting, recording, and file retention.

4.a. *Standardize EEO policies and procedures for maintaining complaint data throughout EEO including an update of the 1985 EEO Policy Circular*

IHS Response - We concur. A revision to the existing IHS EEO policy directive is currently in progress.

4.b. *Create a standardized system so Headquarters and EEO field staff can track complaint status and generate reports*

IHS Response - We concur. The *EEO Assistant* is the new tracking system that will be used by Headquarters to track EEO cases and generate reports.

OIG Recommendation #5

Implement policy guidance on confidentiality.

5.a. *Provide guidance on the role of Area and Service Unit directors in both the informal stages and in formal stages and in sexual harassment cases*

IHS Response - We concur. Attached to this response is a list of training sessions planned for FY 2000 and conducted this year. Training for all employees includes "Prevention of Sexual Harassment Training" as well as "ADR training". Confidentiality is emphasized at each training session.

5.b. Provide guidelines on the maintenance of counselors' informal notes

IHS Response - We concur. Guidance on maintenance of counseling records will be communicated during training sessions.

OIG Recommendation #6

Improve management oversight and accountability.

6.a. Use ASMB's self-evaluation tool to help ensure the effective management of EEO complaints processing

IHS Response - The IHS concurs with the need to have an Agency self-evaluation tool. ASMB will be consulted in the development of an IHS evaluation instrument that meets the requirements of the Federal Managers Financial Integrity Act, and the IHS Management Control Policy.

6.b. Establish both short-term and long-term EEO goals and objectives to restore confidence in the EEO process by:

- i. mounting a national initiative that demonstrates IHS commitment to providing a discrimination-free workplace, where EEO matters can get quickly and fairly resolved*
- ii. publicizing the availability of counseling services and training*
- iii. regularly evaluating EEO goals and objectives*

IHS Response - We concur.

6.c. Provide sufficient staff in Headquarters East and Oklahoma City to carry out the recommendations contained in this report

IHS Response - The IHS will make every effort to carry out the recommendations contained in this report, within available resources. We will utilize special processes as noted earlier in Recommendation 1.d.

OIG Recommendation #7

Eliminate conflicts of interest and the potential for conflicts of interest.

7.a. Seek legal advice about the extent of EEO investigations allowed to be performed by an EEO specialist

IHS Response - We concur. The IHS has assessed the feasibility of utilizing a private

contractor to handle highly sensitive cases, including conflict of interest cases, for both counseling and investigate services. We have also sought legal advice from OGC with regard to the EEO investigator on staff in the Oklahoma City Area EEO Office. The OGC has advised IHS that this arrangement is not a conflict of interest, but has cautioned that in implementing such an arrangement IHS management must ensure that the investigations are not tainted by management influence or the appearance of management influence.

7.b. Ensure that EEO settlements are paid from a central fund, rather than an Area Director's operating expenses, or otherwise ensure that an Area Director does not have decision-making authority over the settlement amount

IHS Response - We do not concur. Many of the same concerns expressed in our response to Recommendation 2.b. are also applicable here. The IHS Area Offices operate independently and with a high degree of decentralization and autonomy. We believe that the respective Areas related to each EEO issue, should bear the cost of settling those issues. We do not view this practice as a conflict of interest. Rather it is consistent with the Agency's organizational structure and priorities for increased delegations of authority to the lowest possible level.

OXG Recommendation #8

Improve communications and expand EEO training and educational opportunities to all IHS employees, EEO staff and counselors including:

- *Conduct a annual national meeting for EEO staff and counselors*
- *Conduct a regular area-wide regional meetings for EEO staff and counselors*
- *The EEO manager in Oklahoma City, the EEO Director and Headquarters EEO staff should regularly visit all Area Offices*
- *The EEO manager in Oklahoma City, the EEO Director and Headquarters EEO staff should regularly communicate with Area office EEO staff and counselors through e-mail, bulletins and training*
- *The EEO staff and counselors in Area Offices and Service Units should hold regularly scheduled information sessions, and updates to staff*
- *Assemble a comprehensive reference book for EEO counselors with information specific to IHS EEO concerns*
- *Establish an IHS-wide EEO web site*
- *Conduct training focusing on the bases for complaints and an explanation of the EEO process*
- *Establish a counselor training curriculum*
- *Conduct training to counselors at regular intervals*
- *Conduct training that include complaint prevention activities*
- *Offer interactive training for supervisor unable to attend in person because of work*

requirements or leave

IHS Response We concur. An annual, national EEO conference was held in May 2000. This will begin the communication process on how to effectively improve the EEO program. The availability of the EEO web site has been communicated to all employees, including EEO counselors. A comprehensive reference book will be developed for EEO counselors. Training of all employees will be a priority and especially for EEO counselors. Training courses completed and planned are presented in an attachment to this response.

OIG Recommendation #9

Increase employee trust in the EEO process.

- *Management must demonstrate through both words and actions a "zero tolerance" for reprisals*
- *Increase and make more visible upper management's commitment and support of the EEO program*

IHS Response We concur. Improving the communication process and implementing OIG's recommendations should be helpful in improving the EEO program.



MEMORANDUM

MAR 16 2000

To: Inspector General

From: Assistant Secretary for Management and Budget *J. J. Callahan*

Subject: Management Review of IHS EEO Program OEI-05-99-00290

Thank you for the opportunity to comment regarding the subject report. We also appreciate the interaction between our staffs in the development, design and interview processes involved in the conduct of the evaluation. In general, we believe that the evaluation report represents a comprehensive and accurate assessment of those areas which you were charged to review. With respect to the report and its recommendations, we offer the following comments:

1. We concur that IHS needs to improve counselor performance and supervision, which can occur, among other means, through an increase in staffing levels. We recognize, however, that staff supplements can be achieved through a wide range of flexibilities (i.e., term appointments, contracting, job sharing, etc.).

In addition, we believe that the recommendation for IHS to provide "sufficient" staff to carry out report recommendations requires further definition.

We suggest that IHS should review and address EEO staffing vis-a-vis the recommendation to increase staff levels in order to take fiscal constraints into consideration.

2. We disagree with the recommendation that IHS should ensure that EEO settlements are paid from a central fund, rather than an Area Director's operating expenses. Pursuant to EEOC policy and long-standing practice, the costs of EEO complaints at the administrative level should be borne by the office in which the complaint arose. If paid from a central fund, there is no accountability or incentive for complaint prevention by the affected office.
3. We have noted that the IHS has launched its EEO website and recommend that it be used to assist in training delivery, such as interactive training for employees and supervisors.

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4. The recommendations to increase employee trust in the EEO process should be strengthened to urge IHS to develop a strategy identifying specific measures and target dates by which management can communicate its commitment and support to the EEO program. Such a plan could be later used as an assessment tool.
5. The follow-up evaluation on the implementation of the OIG recommendations will be accomplished by a joint effort in the Office of Human Resources. Please strike the singular reference to the EEO Programs Group.

Again, thank you for allowing this input.